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Nos. 84-483, 84-870 and 84-900

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In the Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL.,
PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a district court asked to enforce an order of the Federal Communications Commission (FCC) under 47 U.S.C. 401(b) may deny enforcement on the ground that the order is ultra vires, where exclusive jurisdiction to determine the lawfulness of FCC orders rests in the courts of appeals, a petition for review of the pertinent FCC order is pending in a court of appeals at the time enforcement is sought in a district court, and a stay could be sought in the court of appeals.

2. Whether the Federal Communications Commission's order preempting inconsistent regulation by state commissions is an "order" that may be enforced under 47 U.S.C. 401(b).

3. Whether a district court exceeded its authority to enforce an order of the Federal Communications Commission by requiring a state commission to permit a telephone company to increase its rates by a specific amount so as to comply with depreciation methods prescribed by the Federal Communications Commission.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitations to the Solicitor General to express the views of the United States.

STATUTES INVOLVED

Relevant statutes are set forth in the petitioners' appendix (at A71-A74) in No. 84-483.

STATEMENT

The Federal Communications Commission (FCC) determined in 1983 that state commissions could not order telephone companies to use depreciation methods contrary to those the FCC had prescribed. That order was affirmed on review by the Fourth Circuit, which had exclusive jurisdiction to determine the validity of the order and to stay or enjoin it pending review. The three cases addressed in this brief all involve disputes between telephone companies and state commissions that refused to permit the telephone companies to follow the depreciation methods prescribed by the FCC. In each case, the telephone company filed an enforcement action in a federal district court pursuant to 47 U.S.C. 401(b), seeking to compel the state commission to permit it to use the FCC's depreciation methods in state ratemaking proceedings. In the Arkansas case, No. 84-483, the Eighth Circuit overturned a district court order refusing to enforce the FCC's order on the ground that the decision was ultra vires. In the Maine case, No. 84-900, the First Circuit held that the FCC's decision that state commissions were preempted from requiring the use of inconsistent depreciation methods was not the type of "order" that telephone companies could enforce under Section 401 (b), and so it vacated an injunction issued by a dis-

trict court. In the Louisiana case, No. 84-871, the Fifth Circuit expressly rejected the First Circuit's conclusion in the Maine case and upheld an injunction issued by a district court.

1. Section 220(b) of the Communications Act of 1934, 47 U.S.C. 220(b), authorizes the FCC to prescribe "classes of property" for which depreciation may be charged and to prescribe depreciation procedures; it states that carriers "shall not" use any other classifications or depreciation procedures. In 1980, the Commission issued an order making two changes in the depreciation procedures used by telephone companies. *In re Property Depreciation*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981).[1] The next year, the Commission issued an order providing that a previously depreciable class of property should thenceforth be treated as a current expense. *In re Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).[2] The Commission made each of these changes because it concluded that the prior practices had led to out-of-phase capital recovery and misallocation of costs, which conflicted with the FCC's recently adopted policy of en-

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[1] That decision substituted "equal life grouping" in place of "vintage grouping" and the "remaining life" method of correcting errors in forecasts in place of the "whole life" method. These depreciation rules are described briefly in our Motion to Dismiss and Brief in Opopsition at 5-6 [hereinafter cited as Fourth Circuit Opposition], in *Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 et al., in which the appellant and the petitioners seeks further review in this Court of the Fourth Circuit's decision affirming the FCC's preemption decision.

[2] That decision determined that "inside wiring" should be treated as a current expense rather than capitalized. The decision is described briefly in our Fourth Circuit Opposition at 7.

couraging competition and otherwise were inconsistent with the public interest. The new depreciation methods are intended to make the marketplace operate more efficiently. 84-483 Pet. App. A19-A22.

The FCC, at the request of state commissions and telephone companies, considered whether its depreciation decisions prohibited states from requiring telephone companies to use inconsistent depreciation practices in state ratemaking proceedings. After first deciding that state commissions were not preempted (*In re Uniform System of Accounts*, 89 F.C.C.2d 1094 (1982)), the Commission unanimously determined that state commissions had to follow its recent depreciation decisions if the purposes of those decisions were not to be frustrated. The Commission also determined that Section 220(b), as a matter of law, ousted the states from any role in setting depreciation rates for telephone equipment used in part for interstate services unless the FCC expressly authorized such a role (84-483 Pet. App. A1-A34). The FCC gave general notice of this order (the *Preemption Order*) by publication in the *Federal Register* and by serving a copy of its order on each state commission (*id.* at A25).

Pursuant to the Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, a court of appeals may review an FCC order, such as the *Preemption Order*, if a petition is filed within 60 days. The court of appeals in which the petition is filed has "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency" (28 U.S.C. 2349 (a)). A statutory transfer procedure provides that all review of an agency order may be centralized in one court of appeals (28 U.S.C. 2112(a)). That

court of appeals may stay the FCC order pending judicial review, on a proper showing (28 U.S.C. 2349 (b); Fed. R. App. P. 18).

The *Preemption Order* was appealed to the Fourth Circuit by the Virginia State Corporation Commission. The Louisiana commission and the Arkansas commission intervened in that proceeding and participated in the briefing, along with 15 other state commissions. None of the parties sought to stay the FCC's order. The Fourth Circuit upheld the *Preemption Order* in June 1984. Applying this Court's decision in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982), the court of appeals held that the FCC acted within the scope of its "authority to insure efficient operation of the interstate telephone network." *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388, 394 (4th Cir. 1984). A jurisdictional statement and three petitions for a writ of certiorari have been filed seeking review of that decision (Nos. 84-871, 84-889, 84-1054 and 84-1069).

2. The Arkansas case arose after the FCC's *Preemption Order* but prior to the Fourth Circuit's decision. A "three-way meeting" was held by the FCC, the Arkansas Public Service Commission, and Southwestern Bell.[3] Following the meeting, the FCC issued an order, in December 1983, prescribing depreciation rates for Southwestern Bell's operations in Arkansas. *In re Prescription of Revised Percentages of Depre-*

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[3] The FCC historically has called periodic "three-way meetings" of telephone companies and federal and state regulators to consider depreciation rates for particular companies. See *In re Prescription of Revised Percentages of Depreciation*, 88 F.C.C.2d 1223, 1225 (1982).

ciation, 96 F.C.C.2d 257, 291 (1983). The order made clear that state commissions were required to follow the prescribed depreciation procedures (*id.* at 261-262 n.3). No party sought review of that order.

In January 1984, the Arkansas commission denied Southwestern Bell's rate proposal, which had sought to recover increases in depreciation expenses that the telephone company had calculated on the basis of the FCC's prescriptions. *Re Southwestern Bell Telephone Co.*, 58 Pub. Util. Rep. 4th (PUR) 82 (Ark. P.S.C. 1984). The Arkansas commission took "administrative notice" of the FCC's December 1983 depreciation order for Southwestern Bell's operations in Arkansas (*id.* at 90); but it refused to comply with that order and with the *Preemption Order*, stating that it was "convinced that the FCC is totally without any valid legal foundation to support its claim of preemption over the states with regard to intrastate depreciation rates" (*id.* at 93-94).

Southwestern Bell then sought enforcement of the FCC's orders in the United States District Court for the Eastern District of Arkansas under 47 U.S.C. 401(b). Section 401(b) provides that, if "any person fails or neglects to obey any order of the [FCC] * * * any party injured thereby * * * may apply to the appropriate district court of the United States for the enforcement of such order." The statute provides that the district court "shall enforce obedience to such order" if it finds that the order was "regularly made and duly served." The Arkansas commission stipulated that it was not obeying the *Preemption Order* and that the order was "regularly made and duly served." It disputed the FCC's authority to issue depreciation prescriptions that preempt state commissions.

The district court, in an opinion issued prior to the Fourth Circuit's decision upholding the *Preemption Order*, refused to enforce the FCC's orders. It noted that, under the Hobbs Act, "only a court of appeals may invalidate an FCC order" (Pet. App. A36). But the district court denied enforcement after determining that the *Preemption Order* was "ultra vires" because its prescription of uniform depreciation procedures necessarily affected intrastate ratemaking (*ibid.*).

The Eighth Circuit reversed (Pet. App. A43-A55). It noted that this Court had made clear, in *FCC* v. *ITT World Communications, Inc.*, No. 83-371, slip op. 4 (Apr. 30, 1984), that "[l]itigants may not evade" the provision of the Hobbs Act providing that exclusive jurisdiction to review FCC orders lies in the courts of appeals by arguing in a district court that an FCC order is ultra vires. But the district court had "countenanced just such an evasion" by the Arkansas commission (Pet. App. A50). The Eighth Circuit did not read the Hobbs Act as "withholding all discretion from the district court with respect to the issuance of an injunction," but concluded that, under the facts of this case, a refusal to enjoin the Arkansas commission's disobedience would be an abuse of discretion (*id.* at A54). The Eighth Circuit noted that the Arkansas commission was participating in the Fourth Circuit's review of the *Preemption Order* but had not sought a stay in that Court. The Eighth Circuit characterized the Arkansas commission's action as a "studied consideration of * * * defiance" of the FCC's order (*id.* at A54). It therefore ordered the district court to enter the injunction requested by Southwestern Bell, noting that it

could reconsider the injunction when the Fourth Circuit ruled on the validity of the *Preemption Order*.[4]

3. The Maine case arose in July 1982, when New England Telephone sought a rate increase from the Public Utilities Commission of Maine based on the depreciation methods prescribed by the FCC. As in the Arkansas case, the Maine commission refused to permit the telephone company to follow the FCC's prescriptions because it held that "the FCC erred" in concluding that it could issue preemptive depreciation prescriptions. *New England Telephone & Telegraph Co.*, No. 82-124 (Apr. 26, 1983), slip op. 36. New England Telephone filed an enforcement action under Section 401(b), and the United States District Court for the District of Maine issued an injunction instructing the Maine commission to permit the telephone company to use the depreciation practices prescribed by the FCC (Pet. App. 42c-44c).

The First Circuit reversed (Pet. App. 1a-14a). It held that the *Preemption Order* is not an "order" under Section 401(b). The court ruled that only "adjudicative orders," as opposed to orders resulting from rulemaking proceedings, may be enforced under that Section. The court recognized (Pet. App. 11a) that "our interpretation requires reading [order] differently" in Section 401 than this Court read the word "order" in Section 402 (47 U.S.C. 402) in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942). But the court found other argu-

[4] On remand, and after the Fourth Circuit's decision, the district court issued an injunction instructing the Arkansas commission to permit Southwestern Bell to use the depreciation methods prescribed by the FCC for state ratemaking purposes.

ments persuasive. The court concluded that other sections of the Act "use the word 'order' in a way that seems to envision Commission decisions requiring specific actions of specific carriers," while the *Preemption Order* has general applicability (Pet. App. 10a). In the court of appeals' view, Section 401(b) "can be read more fairly and coherently" if "order" is narrowed to permit enforcement actions in district courts only of such specific orders (Pet. App. 9a). Furthermore, as a policy matter, the court thought it desirable to prohibit private parties from enforcing orders of general applicability so that the FCC could itself determine when enforcement actions regarding such orders were needed.

New England Telephone sought rehearing. It argued that its enforcement action could be viewed as an action enforcing a 1982 adjudicative order, *In re Prescription of Revised Percentages of Depreciation* (*1982 Prescription Order*), 92 F.C.C.2d 920 (1982), the type of order that the First Circuit concluded could be enforced by a private party under Section 401(b). The First Circuit issued a supplemental opinion rejecting this argument. It noted that the *1982 Prescription Order* "expressly left open" the issue whether its depreciation rules were preemptive so that it was not accurate to say that New England Telephone sought enforcement of that order (Pet. App. 2b). Furthermore, the court stated, New England Telephone had not made this argument previously, and it "would be unfair to other parties in the case" to accept it on rehearing (*ibid.*).

4. The Louisiana case arose in May 1982, when South Central Bell sought a rate increase that was based in part on application of the FCC's depreciation methods. The Louisiana Public Service Commis-

sion denied the telephone company's request (J.S. App. A99-A101). The Louisiana commission "clearly implied its refusal to implement FCC-prescribed depreciation methods" (*id.* at A10 (footnote omitted)). South Central Bell filed an enforcement action under Section 401(b) in the United States District Court for the Middle District of Louisiana, and that court issued a preliminary injunction ordering the Louisiana commission to permit the telephone company to use the depreciation practices prescribed by the FCC.

The Louisiana commission responded by finding that application of those methods resulted in an increased expense level of $40.5 million. But the Louisiana commission decided, without further proceedings, to reduce the telephone company's rate of return from 13.5% to 12%, so it approved a rate increase of $12.7 million rather than $40.5 million. J.S. App. A10-A11.

The district court then concluded that the Louisiana commission "has not complied with the order of this court" (J.S. App. A55). The court stressed that this commission "received no evidence" before adjusting the rate of return; it instead engaged in "a simple exercise in arithmetic design to minimize the increase in telephone rates" (*ibid.*). The district court modified its injunction by ordering the commission to permit South Central Bell to increase its revenues in order to recover the entire amount the commission had determined was required on account of application of the depreciation practices prescribed by the FCC.

The court of appeals affirmed (J.S. App. A1-A35). It first considered the position adopted by the First Circuit in the Maine case—that the *Preemption Order* is not an "order" under Section 401(b)—and re-

jected it (J.S. App. A17-A23). The court noted that "the First Circuit was not able to cite * * * a single precedent in support of its" narrow interpretation (*id.* at A18). On the contrary, *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945), in which the Court assumed that "order" under Section 401 included rulemaking orders, and *Columbia Broadcasting System* v. *United States, supra,* in which the Court read "order" under Section 402 to include rulemaking orders, strongly supported the conclusion that the *Preemption Order* is an "order" (J.S. App. A18-A20).

The Fifth Circuit also found the policy justifications underlying the First Circuit's decision unpersuasive. Contrary to the First Circuit, the Fifth Circuit "simply [did] not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined" by reliance on private enforcement of rules (*id.* at A22). Indeed, the court noted that unfairness can result from non-compliance with an administrative rule, and situations exist where only a private party has a sufficient interest to enforce compliance (*id.* at A21-A22). In any event, it also noted, the FCC can "avoid private incursions upon its enforcement responsibilities" by intervening and by filing amicus briefs; and courts may apply the doctrine of primary jurisdiction in order to obtain the FCC's views, when needed (*id.* at A22). Accordingly, the Fifth Circuit held that "the FCC Preemption Order is an order within the meaning of § 401(b)" (*id.* at A23).

The court of appeals also rejected the Louisiana commission's attack on the district court's modified preliminary injunction. Like the district court, the

court of appeals recognized that state commissions have primary authority to set intrastate rates (*id.* at A28). But the court of appeals found that the district court's determination that the Louisiana commission had adjusted the rate of return without further proceedings merely to avoid high telephone rates was not clearly erroneous (*id.* at A30-A31). And the court determined that, since "it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that presumption," the Louisiana commission erred in reducing the rate of return summarily merely to offset increased depreciation expenses (*id.* at A29-A30).

ARGUMENT

In our view, none of the issues raised by these cases warrants the Court's attention. The ultimate issue underlying the disputes between the telephone companies and the state commissions—the validity of the FCC's *Preemption Order*—is not properly presented by any of these cases. That issue is presented by the petitions and jurisdictional statement challenging the Fourth Circuit's affirmance of the FCC's *Preemption Order*. See our Fourth Circuit Opposition. While there is a conflict between the First and Fifth Circuits regarding the type of "order" that may be enforced by private parties under Section 401(b), and while we think that the First Circuit erred in holding that private parties may not enforce orders of the kind involved here, its decision is unlikely to have any important consequences. Nor do we think that the modified preliminary injunction upheld by the Fifth Circuit requires review.

1. None of these three enforcement cases properly presents the issue whether the FCC acted within the scope of its authority in issuing the *Preemption Order*. The Eighth Circuit (Pet. App. A55), the First Circuit (Pet. App. 5a), and the Fifth Circuit (J.S. App. A13) each recognized that, under the Hobbs Act, the Fourth Circuit had exclusive jurisdiction over that issue.[5] That is correct. And, as we argue in our opposition to the Fourth Circuit petitions, that court properly applied settled law in upholding the *Preemption Order*, so there is no need for this Court to review that issue even in the one case that properly presents it—the Fourth Circuit case.

The Arkansas commission nevertheless argues (Pet. 6-19) that the Eighth Circuit should have held the *Preemption Order* ultra vires, and that its refusal to do so is inconsistent with three decisions of this Court, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). But the Arkansas commission is wrong in contending that the Eighth Circuit refused to recognize that courts enforcing orders under Section 401(b) retain equitable power to refuse to enforce those orders. Citing *Hecht Co.* v. *Bowles*, *supra* (Pet. App. A54), the Eighth Circuit held that district courts retain some discretion to refuse to enforce orders under Section 401(b) even when all the statutory requirements for enforcement are met. It instead merely held that, "[u]nder the circumstances of this case, * * * denial of injunctive relief would

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[5] Thus, no error was committed of the sort that occasioned our petition for a writ of certiorari in *ICC* v. *Tri-State Motor Transit Co.*, No. 84-1515 (filed Mar. 25, 1985).

be an abuse of discretion" (Pet. App. A54). In reaching this conclusion, the court of appeals gave particular weight to what it regarded as the Arkansas commission's studied defiance of the FCC's order, even though the state commission could have sought a stay of that order in the Fourth Circuit review proceeding in which it was a party (*ibid.*). Thus, most of the argument in the Arkansas petition misses the mark because the commission has misread the Eighth Circuit's opinion.[6]

2. Despite the conflict in the circuits, we do not think that this Court need consider the issue of what type of "order" may be enforced under Section 401 (b).[7] While, in our view, the First Circuit's decision is erroneous, that decision will probably not have important consequences. In part this is because the First Circuit's holding, as modified on rehearing, should not bar private enforcement actions involving FCC depreciation prescriptions in the future. If we are wrong, the Court may address the issue when a future private enforcement action is barred.

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[6] Moreover, the Fourth Circuit's decision upholding the *Preemption Order*, which followed the Eighth Circuit's decision that the *Preemption Order* cannot be deemed ultra vires, confirms that the Eighth Circuit was correct. Since, in our view, there is no need for this Court to review the Fourth Circuit's decision (see our Fourth Circuit Opposition), which squarely presents the issue of the FCC's preemptive power over depreciation methods, *a fortiori* there is no justification for this Court to consider the issue as presented in the Arkansas case.

[7] The conflict is between the First and the Fifth Circuits. The Arkansas commission did not argue that the *Preemption Order* is not an "order," so the Eighth Circuit did not address the issue.

On the merits, we think the Fifth Circuit has shown that the First Circuit erred in its legal analysis. The First Circuit acknowledged, in its first decision, that its holding necessitated differing interpretations of "order" in Section 401 and Section 402, in light of this Court's decision in *Columbia Broadcasting System* (Pet. App. 11a-12a). In its request for rehearing, New England Telephone noted that the Court in *Ambassador, Inc.* v. *United States, supra*, had assumed that private parties could enforce rulemaking orders. In its supplemental opinion, the First Circuit stated (Pet. App. 2b-3b) that *Ambassador* is distinguishable because it might have involved Section 401(a) rather than Section 401(b), since the Court did not specify which subsection of Section 401 was being construed. But the Fifth Circuit showed that *Ambassador* involved Section 401(b), not Section 401(a). The Fifth Circuit reasoned that, since Section 401(a) authorizes actions to enjoin violation of the Communications Act itself, while Section 401(b) authorizes actions to enforce orders of the FCC, and the suit in *Ambassador* sought to enforce a rule contained in a telephone company tariff, and not to enforce a provision of the Act itself, it must have been brought under Section 401(b) (J.S. App. A18-A19 & n.18).

The First Circuit also erred in its policy analysis. As the Fifth Circuit concluded (J.S. App. A22), federal interests are generally advanced by the availability of private enforcement of FCC orders, including those orders resulting from proceedings similar to those involved in these cases. In cases where that is not so, the agency, by participating as an intervenor or an amicus, and the courts, by invoking the doctrine of primary jurisdiction, can adequately protect federal interests.

But, despite these errors, the First Circuit's decision is not likely to cause harm beyond the loss to the telephone company involved in that case. Its position has not only been rejected by the Fifth Circuit, but by the Fourth Circuit as well (*Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 748 F.2d 879 (4th Cir. 1984), petition for cert. pending, No. 84-1362), and we would expect it to be rejected if raised in other circuits. In addition, as the First Circuit itself noted (Pet. App. 3b), private actions seeking enforcement of orders resulting from FCC rulemaking proceedings have been rare. It may be that, after the unusual flurry of litigation resulting from the recent changes in the telephone industry, such actions will again become rare.

In any event, it is not clear to us that the First Circuit's opinion will be troublesome in the future, even in cases brought in that circuit. In its rehearing petition, New England Telephone argued that, even if it could not seek enforcement of the *Preemption Order*, the FCC's *1982 Prescription Order* was specific enough, under the First Circuit's analysis, to qualify as an adjudicative order that it could enforce. The First Circuit gave two reasons for rejecting that argument. One reason, which will not apply in the future, was that it would be unfair to the other parties in the Maine case to permit New England Telephone to raise the argument on rehearing. The other reason was that the *1982 Prescription Order* preceded the *Preemption Order* and "expressly left open the question" whether its prescriptions preempted the states. Starting with the FCC's 1983 *Prescription Order*, however, each depreciation prescription order specifically states that it preempts state rules (see,

e.g., 96 F.C.C.2d at 261-262 n.3). Since the FCC issues depreciation prescription orders for approximately one-third of the nation's major telephone companies each year (*id.* at 260)—after three-way meetings involving the FCC, the telephone company, and a state commission—by the end of this year a depreciation prescription order that expressly states that it has a preemptive effect should be in force for nearly all of the nation's telephone companies. As we read the First Circuit's supplemental opinion, even that Circuit may permit private actions to enforce these prescription orders. Therefore, the issue presented in this case may not arise again, at least not after this year. Since the conflict in the circuits may have no future impact by the time this Court can resolve it, there is no need for review of this issue.[8]

3. The Louisiana commission also contends that the Fifth Circuit erred in upholding the district court's modified preliminary injunction.[9] It char-

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[8] If the Court concludes that it should resolve the conflict between the First and Fifth Circuits on the issue whether the *Preemption Order* is an "order" enforceable under Section 401(b), we submit that it should confine its grant of certiorari to that issue, affirm the Fifth Circuit, and reverse the First Circuit.

[9] The Louisiana commission may not obtain review of this issue by appeal under 28 U.S.C. 1254(2).

First, the injunction at issue is a preliminary injunction. Under *Slaker* v. *O'Connor*, 278 U.S. 188, 189-190 (1929), only "final judgments" are subject to review under Section 1254(2). See *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956). That rule has been questioned (*City of New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976); *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77, 82-83 (1958)), but never repudiated. In *Doran* v. *Salem Inn, Inc.*, 422 U.S.

acterizes the district court's action as requiring state commissions to freeze authorized rates of return (J.S. 23). This is simply not so. There is actually

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922, 927 (1975), the Court dismissed an appeal, citing *Slaker*, and noting that the party sought "review of the affirmance of a preliminary injunction." Commentators agree that Section 1254(2), like 28 U.S.C. 1257(2), should be subject to a "final judgment" requirement. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037, at 36-39 (1978). In particular, those commentators argue that appellate jurisdiction ought not lie under Section 1254(2) to review "decisions that affirm a preliminary injunction" (*id.* at 38). That position is fortified by this Court's recent statements that statutes authorizing appeals are to be construed narrowly (see, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983)). A narrow construction leads to retention of the final judgment rule of *Slaker*. Since the Louisiana commission challenges a preliminary injunction, rather than a final order, an appeal is not proper.

Second, the district court did not strike down any state statute (see *Silkwood*, slip op. 7-8); it merely ordered the Louisiana Public Service Commission to obey an injunction requiring it to follow the FCC's prescribed depreciation methods. The Louisiana commission cites two cases, *Atchison, T. & S. F. Ry.* v. *Public Utilities Commission*, 346 U.S. 346 (1953), and *Lake Erie & W.R.R.* v. *State Public Utilities Commission*, 249 U.S. 422 (1919), decided under 28 U.S.C. 1257(2), that held that orders of state commissions were "legislative in nature." To be sure, ratemaking has legislative origins, since in the past some state legislatures set utility rates. In light of the policy that statutes authorizing appeals are to be construed narrowly, these decisions, decided under Section 1257(2), ought not be extended to Section 1254(2). See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (Puerto Rican statute is not a state statute under Section 1254(2)), and *Torres* v. *Puerto Rico*, 442 U.S. 465, 468 (1979) (appeal lies under Section 1257(2) to review a

very little difference between the parties on any question of importance in the future. The only real issue is whether the Louisiana commission followed the district court's original preliminary injunction. We think that it is clear that the Louisiana commission flouted the court's order, necessitating the modified injunction as a remedial action by the district court to vindicate its own original order.

The Louisiana commission complains (J.S. 21) that "[t]he FCC never suggested that the *Preemption Decision* could bind a state commission to a previously authorized rate of return," implying that the FCC has changed its position. The FCC has not changed its position and agrees with the Louisiana commission that a state commission may adjust its authorized rate of return in light of the adjustment of other factors, including depreciation practices, that affect investor risk. Thus, there is no disagreement that primary authority over intrastate ratemaking lies with state commissions. The FCC's interest is in requiring adoption of depreciation methods that insure accurate allocation of costs so that telephone companies will replace equipment when, in economic reality, it is efficient to do so. The FCC is not in the business of setting intrastate telephone rates.

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decision upholding a Puerto Rican statute). There is no good reason to characterize ratemaking orders as state statutes under Section 1254(2). Unlike statutes, they are not codified and are generally transitory in nature, reflecting changes in economic conditions. Accordingly, this Court should not extend the meaning of "state statute" under Section 1254(2) to include ratemaking orders.

Should the Court disagree with our submission that an appeal does not lie in No. 84-870, it should affirm the judgment for the reasons stated in this brief.

The FCC and the Louisiana commission disagree only on the specific question of whether the state commission's abrupt adjustment of the rate of return in this case was correctly characterized as disobedience to the district court's injunction, rather than as a separate ratemaking decision. We think the Fifth Circuit's opinion makes clear that it was properly found to be the former. The state commission held no hearings and considered no new evidence before adjusting the rate of return (J.S. App A31). It presented its argument that the adjustment was warranted in light of reduced investor risk caused by the change in depreciation practices for the first time in its reply brief in the court of appeals (*ibid.*). In these circumstances, the district court did not abuse its discretion by modifying its injunction so as to effectuate its previous order. In any event, whether, under the peculiar facts of this case, the district court correctly determined that the Louisiana commission was improperly evading compliance with the court's injunction is not a question warranting review by this Court.[10]

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[10] The Louisiana commission's other arguments also do not warrant review by this Court. The Johnson Act, 28 U.S.C. 1342, does not foreclose federal court jurisdiction in this case because jurisdiction is not based on diversity or on a claim that the state's rate order was unconstitutional, but on a federal statute expressly authorizing the district court to act (J.S. App. A33 n.28). There is, finally, no basis for the argument that state commissions are exempt from enforcement actions under Section 401(b) on grounds that they are not "persons." The definition of "persons" in the Act is broad and inclusive (47 U.S.C. 153(i)). No court of appeals has accepted this argument, and thus there is no conflict at that level for this Court to resolve.

CONCLUSION

The Court should dismiss the appeal in No. 84-870 for want of jurisdiction and treat the papers on which that appeal was filed as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103. The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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